APPELLANT PRO SE:

BEDFORD LEE ATWELL
Carlisle, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General Of Indiana

MATTHEW D. FISHER
Deputy Attorney General
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

BEDFORD LEE ATWELL,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 79A02-0511-PC-1026
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Donald C. Johnson, Judge
Cause No. 79D01-9805-CF-64

March 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Bedford Lee Atwell appeals the denial of his Petition For Post-Conviction Relief ("PCR petition"). As grounds for relief, Atwell challenges the post-conviction court's quashing of his subpoena for the Chief Deputy Prosecuting Attorney. He further asserts prosecutorial misconduct, and ineffective assistance of counsel. His claims all revolve around his assertion that he suffered from mental illness at the time of commission of the crime. Finding no error, we affirm.

Facts and Procedural History

The following facts were set forth in Atwell's direct appeal, which affirmed his conviction and sentence:

> Atwell lived in the apartment of his chronically ill brother John Atwell ("John"), and Atwell's long-time friend David York ("York") lived in an apartment in the same building. On May 18, 1998, Atwell's girlfriend Wendy Veach ("Veach") complied with Atwell's request to purchase ammunition for his .32 caliber derringer pistol, which he had previously shown to York. Later that evening, York was in Atwell's apartment when Atwell began arguing with Veach. Atwell threatened to hit Veach, and York advised her to leave the apartment. York returned to his apartment and saw Veach drive away. Shortly thereafter, Atwell went to York's apartment, and the two men began arguing. York told Atwell to leave, saw him reach into his pocket for a gun, and started to run. York heard Atwell fire two shots, felt something warm on his right shoulder, and ran across the street to a neighbor's house. The neighbor called 911.
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> When police responded to the call, they assisted the wounded York and persuaded Atwell to leave the apartment after a two-hour standoff. John gave police permission to search his apartment, where they found Atwell's unloaded derringer in a trash can, as well as a box of .32 caliber ammunition with two rounds missing. Police later determined that the bullet removed from York's shoulder had been fired from the upper barrel of Atwell's derringer.
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> The State charged Atwell with attempted murder, battery, criminal

> recklessness, and pointing a firearm. After his first trial ended in a hung jury, Atwell was found guilty as charged on July 20, 1999. On July 29, 1999, Atwell requested a presentence physical and mental evaluation. At the sentencing hearing on August 20, 1999, the trial court denied Atwell's motion, entered judgment only on the attempted murder conviction, and sentenced Atwell to 50 years of imprisonment.

Atwell v. State, 738 N.E.2d 332 (Ind. Ct. App. 2000), trans. denied, cert. denied, 534 U.S. 876, 122 S.Ct. 175, 151 L.Ed.2d 121 (2001). Atwell was represented at trial by attorney Steven Meyer. The Chief Deputy Prosecuting Attorney was John Meyers ("deputy prosecutor Meyers").

Atwell filed a PCR petition, proceeding pro se.[1] Atwell filed a Request for Issuance of Subpoenas for, among others, deputy prosecutor Meyers. The trial court granted Atwell's Request for Issuance of Subpoenas. On April 26, 2004, an evidentiary hearing was held.

Atwell introduced testimony from his girlfriend, Linda Darnell. Darnell testified that on the days prior to the shooting, after witnessing instances of unusual behavior by Atwell, she contacted people, including probation officer Joe Hooker, in an attempt to have Atwell placed in emergency detention based on her belief that Atwell was suffering from mental illness and was a dangerous person at the time. She further testified Atwell had been arrested for criminal mischief and there was a restraining order against Atwell, due to his behavior in her neighborhood. Darnell also testified that after Atwell's arrest, the deputy prosecutor's investigator called her but she told the investigator she did not have time to talk. She never

[1] We note that Atwell's brief fails to comply with Indiana Appellate Rule 46(A)(10), which provides that briefs "shall include any written opinion, memorandum of decision or findings of fact and conclusions thereon relating to the issues raised on appeal…." It is well settled that pro se litigants are held to the same standard as are licensed lawyers. Goossens v. Goossens, 829 N.E.2d 36, 43 (Ind. Ct. App. 2005).

contacted him and she stated he never called her back. She also stated she had delivered a package from the Veteran's Administration containing medical reports and information concerning Atwell's treatment for post-traumatic stress disorder to the prosecutor's office.

Joe Hooker, the probation officer, testified that Darnell contacted him in an attempt to obtain an emergency detention of Atwell based on Atwell's mental health prior to the shooting. Hooker stated he did not report this information to anyone.

Atwell's trial counsel, Steven Meyer, testified that he was aware, based on the documents from the Veteran's Administration, that Atwell had a mental disorder that limited his ability to function normally in society. Meyer testified he had several conversations with Atwell in which he told Atwell that if he raised a defense of insanity or guilty but mentally ill, Atwell would have to admit he shot the victim but that he could not appreciate the wrongfulness of the conduct. Meyer stated Atwell refused to allow this defense. Meyer stated he did not have Atwell examined by a psychiatrist. He stated his investigation of Atwell's mental health consisted of reviewing the Veteran's Administration documents from Darnell and discussing the matter with Atwell.

When deputy prosecutor Meyers was called as a witness at the hearing, the State objected and filed a Motion for Protective Order asking that the subpoena issued to deputy prosecutor Meyers be quashed. Atwell filed his response to the State's Motion for Protective Order. The post-conviction court issued an order granting the protective order.

On September 26, 2005, the post-conviction court denied Atwell's PCR petition.

Atwell appeals that denial.

Discussion and Decision

I. Standard of Review

Before discussing Atwell's allegations of error, we note the general standard under which we review a post-conviction court's denial of a PCR petition.

> Post-conviction procedures do not afford petitioners an opportunity for a "super appeal." Matheney v. State, 688 N.E.2d 883, 890 (Ind. 1997), reh'g denied, cert. denied, 525 U.S. 1148, 119 S.Ct. 1046, 143 L.Ed.2d 53 (1999). Rather, they create a narrow remedy for subsequent collateral challenges to convictions. Id. Those collateral challenges must be based upon grounds enumerated in the post-conviction rules. Id.; see also Ind. Post Conviction Rule 1(1). Petitioners bear the burden of establishing their grounds for relief by a preponderance of the evidence. Matheney, 688 N.E.2d at 890; see also P-C.R. 1(5). When petitioners appeal from a denial of post-conviction relief, they appeal a negative judgment. Miller v. State, 702 N.E.2d 1053, 1058 (Ind. 1998), reh'g denied, cert. denied, 528 U.S. 1083, 120 S.Ct. 806, 145 L.Ed.2d 679 (2000). Therefore, on appeal, a petitioner must show that the evidence, when taken as a whole, "leads unerringly and unmistakably to a conclusion opposite to that reached by the [post-conviction] court." Matheney, 688 N.E.2d at 890-891. We will disturb the post-conviction court's decision only if the evidence is without conflict and leads to but one conclusion and the post-conviction court has reached the opposite conclusion. Emerson v. State, 695 N.E.2d 912, 915 (Ind. 1998), reh'g denied.

Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003), trans. denied.

II. Subpoena for Deputy Prosecutor

Atwell first asserts the post-conviction court erred in quashing his subpoena for deputy prosecutor Meyers. Atwell states the deputy prosecutor's testimony about his knowledge of Atwell's mental health prior to the crime and when that information was available to deputy prosecutor Meyers made him a necessary witness. Atwell complains the

granting of the State's Motion for a Protective Order denied him the opportunity to establish his grounds for relief by a preponderance of the evidence.

Atwell failed to make an offer of proof in response to the court's ruling, and thus failed to preserve the issue for appellate review. Bockting v. State, 591 N.E.2d 576, 580 (Ind. Ct. App. 1992), trans. denied, (issue regarding trial court's ruling on motion to quash was waived for failure to make an adequate record). To preserve an issue for appellate review, a party must make some showing of what the excluded evidence would have been. Id. Atwell's mere contention that the deputy prosecutor's testimony could have established that the State withheld exculpatory evidence is inadequate. Lacking specific evidence, we cannot review Atwell's allegation.

Waiver notwithstanding, Atwell has failed to show that the post-conviction court erred in quashing the subpoena. When reviewing the decision denying a defendant the right to call a witness, we must determine: (1) whether the trial court arbitrarily denied the Sixth Amendment rights of the person calling the witness, and (2) whether the witness is competent to testify and whether his testimony would have been relevant and material to the defense. Davis v. State, 529 N.E.2d 112, 114-15 (Ind. Ct. App. 1988) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019, 1025 (1967)). "To be material, the witness's testimony must be sufficient to create a reasonable doubt about a verdict which, based on the entire record, is already of questionable validity." Hunt v. State, 546 N.E.2d 1249, 1251 (Ind. Ct. App. 1989), trans. denied.

In this case there is no indication that the post-conviction court arbitrarily denied

Atwell's right to compulsory process. The post-conviction court was duly advised through the State's Motion for Protective Order and Atwell's responsive pleading. The post-conviction court's order specifically stated that the court found Atwell had not made a sufficient showing of need to call opposing counsel as a witness and thus ordered that deputy prosecutor Meyers was not required to testify. It is evident the post-conviction court specifically considered the issue and did not arbitrarily quash the subpoena.

Turning to the second step of the analysis, there is no dispute as to deputy prosecutor Meyers' competency to testify. We must, therefore, determine whether his testimony would have been both material and relevant to Atwell's position. Atwell has not established that deputy prosecutor Meyers' testimony would have been material, relevant or favorable to him at his PCR hearing. Without an offer of proof, this court cannot determine how deputy prosecutor Meyers would have testified.

Further, deputy prosecutor Meyers' answers to Atwell's interrogatories were admitted at the PCR hearing. The answers deputy prosecutor Meyers provided show: the deputy prosecutor's file contained no information about Darnell's attempt to obtain assistance in placing Atwell in an emergency detention; the deputy prosecutor's office is not usually notified when an attempt is made to place a person in emergency detention based on being a mentally ill and dangerous person; information gleaned from the discovery would not likely have resulted in a conclusion that Atwell was mentally ill; the deputy prosecutor's office had interviewed Darnell concerning Atwell but that there was no information in the file or from his recollection of the interview or interviews of Darnell that resulted in a conclusion that

Atwell was mentally ill. Petitioner's Exhibit I. Thus, deputy prosecutor Meyers' answers did not indicate that he knew of any serious mental illness suffered by Atwell at the time of the shooting. Id. Atwell does not explain how his questioning of deputy prosecutor Meyers would have covered any issues not already covered in the interrogatories. The post-conviction court did not err in quashing Atwell's subpoena for deputy prosecutor Meyers.

III. Suppression of Evidence

Atwell complains that at trial, the State suppressed evidence that would have supported an insanity defense and might have influenced the trial court's sentencing. The evidence he asserts was improperly withheld is evidence his probation officer had of mental illness he allegedly suffered contemporaneous to the shooting. Atwell claims this information was available, and would have shown he was unable to appreciate the wrongfulness of his conduct at the time of the offense and could not have acted with the specific intent to kill. He claims the State impermissibly failed to turn over this exculpatory evidence to either the defense or the court.

The State has an affirmative duty to disclose evidence favorable to a criminal defendant. See Badelle v. State, 754 N.E.2d 510, 526 (Ind. Ct. App. 2001), trans. denied, (quoting Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963)). "The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. To prevail, a defendant must establish (1) that the evidence at issue is favorable to the accused, because it is either

exculpatory or impeaching; (2) that the evidence was suppressed by the State either willfully or inadvertently; and (3) that the evidence was material to an issue at trial. Id. Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

The post-conviction court addressed this contention.

> 11. The Petitioner also advocates that the State withheld information from the defense during the trial stage [of] litigation regarding a mental disease that the defendant claims he was suffering, namely PTSD. No credible evidence was presented to substantiate that premise. In fact, it is clear that the State provided the evidence in its file to the defense. Further, the Petitioner personally better than anyone else knew all of the information that the Petitioner claimed was important in the [sic] regard.
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> 12. Nothing that the Petitioner has put forward in evidence on his PCR would have changed the jury's verdict.

Appellant's Appendix at 212. Thus, the court considered Atwell's claim of alleged mental illness.

Atwell does not meet his burden on this issue. He fails to establish that additional evidence of mental illness would have been material at his trial, given his insistence on not advancing an insanity defense. At the post-conviction hearing, Atwell's trial counsel Steven Meyer stated that he discussed raising an insanity defense with Atwell. Meyer explained he did not do so at Atwell's "insistence" and that Atwell was "adamant" about not pursuing an insanity defense at trial. Transcript at 55, 60. As Atwell did not pursue an insanity defense at trial, evidence of mental illness would not have affected the outcome of his trial.

IV. Effective Assistance of Counsel

Atwell alleges he received ineffective assistance of counsel. He argues his counsel's performance was deficient because he failed to investigate and present a defense based on Atwell's mental health at the time of the crime. Atwell further argues defense counsel's performance was deficient because of his failure to present as mitigating factors at sentencing: (1) evidence that Atwell was suffering from mental illness at the time of the offense, and (2) the likelihood that he could be successfully rehabilitated with the proper medication.

When reviewing ineffective assistance of counsel claims, this court starts with a strong presumption that counsel rendered adequate legal assistance. Collier v. State, 715 N.E.2d 940, 942 (Ind. Ct. App. 1999), trans. denied. To rebut this strong presumption, the petitioner must show "that (1) counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Carr v. State, 728 N.E.2d 125, 131 (Ind. 2000). A reasonable probability is one "sufficient to undermine confidence in the outcome." Id. Because an inability to satisfy either prong of this test is fatal to an ineffective assistance claim, this court need not even evaluate counsel's performance if the petitioner suffered no prejudice from that performance. Vermillion v. State, 719 N.E.2d 1201, 1208 (Ind. 1999).

Atwell first argues his counsel's performance was deficient based on his failure to present a defense based on Atwell's mental health at the time of the crime. However, counsel is given wide discretion in determining strategy and tactics, and therefore courts will

accord these decisions deference. Timberlake v. State, 753 N.E.2d 591, 603 (Ind. 2001), cert. denied, 537 U.S. 839, 123 S.Ct. 162, 154 L.Ed.2d 61 (2002). "A strong presumption arises that counsel rendered adequate assistance and made all significant decision in the exercise of reasonable professional judgment." Id. Trial counsel's decision not to raise the insanity defense is a matter of strategy and does not support a claim of ineffective assistance of counsel. Osborne v. State, 481 N.E.2d 376, 380 (Ind. 1985).

Atwell's trial counsel was not ineffective for failing to present alleged additional evidence of mental illness at trial, inasmuch as Atwell insisted that he not pursue such a defense. Attorney Meyer testified he was aware of Atwell's post-traumatic stress disorder, but was unaware of any other disorders. Tr. at 57. Further, when Meyer interviewed Atwell's girlfriend, Darnell, she did not mention the erratic behavior she now claims Atwell exhibited in the weeks prior to the shooting. Id. at 21, 58. Meyer stated he discussed raising the insanity defense, but did not do so based on Atwell's insistence and unwillingness to admit committing the crime when he could not remember the act.

Atwell claims such evidence would have established an insanity defense or resulted in a shorter sentence. However, the trial court was aware that Atwell had been treated for post-traumatic stress disorder and had admittedly stopped taking his medication in 1997. The trial court specifically found the condition to be a mitigating circumstance. See Atwell, 738 N.E.2d at 336. Atwell does not explain how evidence of additional mental instability would have altered the trial court's evaluation of the aggravating and mitigating circumstances.

The post conviction court's findings of fact included the following:

5. The Petitioner testified in the hearing on the PCR in a manner that was in conflict with prior statements and writings regarding his memory and knowledge of the events of the crime of which he was convicted. In that regard, his testimony in the hearing was self-serving and should not be given weight.

6. The Petitioner proposed in the hearing on the PCR that his trial counsel's representation fell below professional standards for not thoroughly investigating the Petitioner's mental status at the time of the crime and in particular trial counsel did not investigate the statements and activities of a Linda Darnell prior to the trial. The Petitioner urges that a defense based upon mental disease was available to him and would have been persuasive with the jury. The mental disease, he claims, was Post-Traumatic Stress Disorder (PTSD). However the evidence in the hearing on the PCR and record otherwise made made [sic] it clear that both the Petitioner and the defense attorney were aware of and considered possible [defenses] based upon mental disorders. The evidence is clear that the defense attorney was knowledgeable of the Petitioner's history of PTSD. An express decision was made by the Petitioner and his counsel not to pursue defenses based upon mental diseases.

7. Steven Meyer is an experienced and capable attorney with wide experience in criminal cases who performed will [sic] above minimum professional standards in his representation of the Petitioner.

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9. In the hearing on the PCR, Attorney Steven Meyer testified that he and the Petitioner had considered and discussed mental disease defenses and the Petitioner expressly decided to proceed with a different theory of defense. Mr. Meyer's testimony in that regard is credible.

10. The PETITIONER also suggested that further inquiry in his mental status would have produced useful evidence for the sentencing hearing. That question has essentially been waived because of its presentation as grounds on appeal. However that record shows that the court did find as a litigator [sic] that the Petitioner had suffered from the mental disease that the Petitioner now says should have been investigated. The Petitioner's trial counsel requested that this court provide a mental examination of the defendant to demonstrate the particular mental disease existed and the court denied the request. That issue was decided against the Petitioner on direct appeal, and, in any case, this court found in the sentencing that the particular mental disease had existed.

Appellant's App. at 211-12. The post-conviction court concluded that Atwell had not met his

burden to show his trial counsel was ineffective:

> To the contrary, his trial counsel's performance was very professional. Further, even if the Petitioner has identified errors in this trial counsel's performance, it cannot be reasonably said that, but for the proposed errors, the result of the proceeding would have been different. In fact even if the proposed errors were corrected, no significant difference should be expected in the outcome of the trial.

Id. at 213. Further, the post-conviction court stated that assuming for the sake of argument that Atwell had identified errors committed by trial counsel, the errors were harmless. Id.

Atwell fails to demonstrate ineffective assistance of counsel. We decline to find deficient performance based on Atwell's present claims of failure to present evidence relating to his mental health during the penalty phase and sentencing.

Conclusion

Atwell has not shown that the trial court erroneously granted the State's Motion to Quash Atwell's subpoena for deputy prosecutor Meyers. Atwell further has failed to show the State withheld exculpatory evidence. Finally, Atwell has failed to rebut the strong presumption that counsel rendered adequate legal assistance. Accordingly, the post-conviction court's denial of Atwell's PCR petition is affirmed.

Affirmed.

BAKER, C.J., and DARDEN, J., concur.